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SUPREME COURT, U.S.
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In The
Supreme Court of the United States

CHRISTOPHER JAMES NYGUEN AND SHARON K. NYGREN,
Petitioners,

v.

MINNEAPOLIS PUBLIC SCHOOLS; SPECIAL SCHOOL DISTRICT Nº 1; ET AL.
Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI
with Appendix - Volume I of II

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Individuals with Disabilities Education Act, Which Requires Individually Tailored Services and an Individualized Assessment of Progress, Provides a Remedy to a Disabled Student Whose Individualized Education Program Focuses Exclusively on Social, Emotional and Behavioral Needs When He Makes Only Minimal Academic Progress According to Standardized Academic Achievement Tests.

2. Whether the Individuals with Disabilities Education Act, Which Requires a Free Appropriate Public Education to Disabled Students Incorporating State Educational Standards, Is Violated When State Educational Standards Requiring Positive Behavior Interventions and Limiting the Use of Aversive Procedures are Not Met.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals is reported at 323 F.3d 630, and is reproduced at App. B. The order of the Eighth Circuit Court of Appeals denying rehearing is unreported, and is reproduced at App. A. The opinion of the District Court of Minnesota is reported at 36 IDELR 4, and is reproduced at App. C. The opinion of the state educational agency hearing review officer is unreported, and is reproduced at App. D. The original opinion of the state educational agency hearing officer is reported at 102 LRP 7834, and is reproduced at App. E.

JURISDICTION

The judgment to be reviewed was entered on March 21, 2003. A timely petition for rehearing and for rehearing en banc was denied on May 30, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES, RULES AND REGULATIONS INVOLVED

The relevant provisions of the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400, *et seq.*, its implementing regulations, 34 C.F.R. Ch. 300, Section 504

Minnesota special education law, Minn. Stat. Ch. 121 and Ch. 125A, and its implementing regulations, Minn. R., Ch. 3525, are reproduced at App. F-Y.

STATEMENT OF THE CASE

This case raises important, recurring questions relating to the adequacy of special education and related services to students with emotional and behavioral disabilities under the Individuals with Disabilities Education Act ("IDEA" or "the Act"), 20 U.S.C. §§ 1401, *et seq.*, the meaning of this Court's decision in *Board of Education of the Hendrick Hudson Central School District v. Rowley,* 458 U.S. 176 (1982), and the validity of efforts by litigants to circumvent Congress's express commands in the IDEA regarding the individualized nature of special education services and requirements for positive behavior interventions in conformity with state educational standards.

CJN was eight years old and in the third grade during the events at issue during the 2000-2001 school year. CJN is an eligible special education student due to significant brain injury consisting of lesions in and atrophy of his brain, acquired in his pre-school years from a stroke, infection or demyelination. CJN's brain injury produces serious emotional, social, behavioral, and sensory disturbances and migraine headaches that render him in need of intensive behavioral support, individually tailored

need of intensive behavioral support, individually tailored services, and appropriate responses to his challenging behaviors if he is to learn emotional, social and behavioral skills that will enable him to perform adequately in school, and to be self-sufficient, independent and productive as an adult.

CJN was identified and served by the Minneapolis Public Schools ("District") as a special education student since kindergarten, and his mother also consistently provided him with private medical, mental health, and occupational therapy services since kindergarten. CJN's mother provided all relevant medical reports of his brain injury to the District before the start of his third grade year, and his special education eligibility is uncontested.

Consistent with the District's assessments of his eligibility and unique needs, CJN's Individualized Education Program ("IEP") for 2000-2001 identified as the basis of the special education interventions his needs for emotional, social and behavioral skill development, as did all his previous IEPs. App. D and E. CJN's eligibility for special education rested on his inability to build or maintain satisfactory interpersonal relationships with peers and adults, inappropriate types of behavior or feelings under normal circumstances, a general pervasive mood of unhappiness or depression; and a tendency to develop physical symptoms or fears associated with personal or school problems. CJN's eligibility for special education is

not based on academic needs. This determination was made in accordance with federal special education eligibility provisions for children with serious emotional disturbance, and with state special education eligibility provision for children with emotional or behavioral disorders. 34 C.F.R. § 300.7(c)(4); Minn. R. 3525.1329.

Consistent with his eligibility determination, CJN's IEP goals addressed only improving his abilities to maintain self-control, to comply with requests, to follow directions, to participate appropriately in class activities, to independently solve problems, to manage his anger, to build and maintain friendships, and to recognize his self worth. App. D and E. The District did not make any reports of CJN's progress in meeting the goals on his IEP. The only credible data in the record did show that CJN made no progress and in fact regressed in these skills identified for improvement on his IEP, demonstrated by increasing use of time-outs, exclusion from class, physical restraint and locked seclusion in response to the very behaviors identified for improvement in his IEP.

Contrary to the majority decision below, the record reflects that CJN was subjected to significant and increasing rates of punishment instead of interventions recognized as effective to address his challenging behaviors. His teacher maintained data showing that CJN was physically restrained every other day in the first half of his third grade year, at a rate six to eleven times greater

than the entire rest of his self-contained special education classroom peers combined for up to an hour at a time. App. D and E. Teacher data also showed that CJN was removed from class activities and sent to time-out every other day in the first half of his third grade year for an average of thirty minutes, three times longer than the average for the rest of his classroom peers. App. D and E. Without positive behavior interventions, contrary to experience and his private therapist's recommendations, and over the objection of his mother, locked seclusion was used with CJN for over an hour on three of his last days in the District schools, including one time for almost three hours. App. D and E. On the last day in the District schools CJN, signaling his frustration, wrapped his shirtsleeve around his neck in front of the observation room window of the locked seclusion room in a suicide attempt. He was suspended from school and removed from school by the police in handcuffs. App. D and E.

The hearing officer concluded:

> The Student's IEP team failed to undertake any analysis of the relationship between the Student's behavior and disciplinary exclusions. The Student was trapped in an increasingly punitive approach to disciplining, which resulted in increasing levels of isolation, time-out and locked seclusion for the Student. [Citations to the record omitted]. No meaningful review of the Student's IEP was undertaken. The failure of a

> district to formalize a plan for addressing the misconduct caused by a student's disability compounds the denial of FAPE. A behavior management plan is punitive in nature where it does not teach the student appropriate behaviors in a positive manner.

App. D.

The use of time-outs and restraints at school to address CJN's social, emotional and behavioral needs was never successful. App. D and E. CJN's treating mental health provider told his IEP team members that the use of restraint actually escalated his behavior. App. D and E. The use of time-outs and restraints at school were the most commonly used method to manage CJN's behavior. App. D and E.

In sharp contrast, when positive behavior interventions were used with CJN at school, his challenging behaviors were eliminated. App. D and E. The District refused to even consider using those methods in CJN's third grade. The hearing officer concluded:

> Past evaluation results and the success of past behavior management methods and strategies were ignored over the objection of the Parent.

App. D. Likewise, the dissent below recognized:

> The record in this case portrays a clear contrast. When the District adapted its approach to meet CJN's unique needs, he made some progress on his behavioral disabilities. But when the District expected CJN's behaviors to conform to its structured and inflexible approach, he began

> to self-destruct.

App. B, 323 F.3d at 643.

Three hearing-officer appointed independent educational evaluators testified that CJN had not been provided services individualized to meet his unique need for improved emotional, social, behavioral and sensory/motor skills. App. D and E. The majority below was satisfied that CJN's special education program provided him with meaningful progress on his IEP because it contained a standard point reward system and (in the last seven days) one-to-one paraprofessional support, because the District proposed two behavior intervention plans with which his mother disagreed, and because evidence from standardized academic achievement tests showed he made slight academic progress. App. B, 323 F.3d at 638-639, 642-643.

> Although it is true, as CJN contends, that the District 'offered only services available within its standardized program for students with emotional and behavioral disorders,' one can reasonably conclude from this
> record that more did not appear necessary at the time to help him make progress behaviorally.

App. B, 323 F.3d at 639.

The dissent below disagreed. Judge Kermit E. Bye correctly concluded that the success of CJN's IEP must be measured by progress in teaching him to control his

behavior, the very goals on his IEP, and that the District's punitive measures demonstrated the absence of individualized programming and the lack of adequate progress.

> The record is replete with evidence that the District's use of a time-out system to restrain and control CJN's behavior failed. The District's approach to CJN's unique disability was counterproductive and actually exacerbated his behavior problems. There is no evidence the time-out system and use of restraints taught CJN to control his behavior. Nor is there evidence the District's ultimate resort to police intervention would ever teach CJN how to become a productive member of society.

App. B, 323 F.3d at 647-648.

The majority below determined the District complied with the IDEA's requirement for positive behavior supports, as well as with Minnesota state education standards governing positive behavior interventions because CJN's IEP contained a standard point reward system and (in the last seven days) one-to-one paraprofessional support, because the District proposed two behavior intervention plans with which his mother disagreed, and because it grossly misread the uncontested evidence in the record of the significant frequency and intensity of the District's use of aversive and deprivation procedures. *Id.* At 640-641. The dissent disagreed:

> . . . I fear we allow Minnesota's education system to take a step backward with our tacit approval of the District's use of restraint to cope with CJN's behavioral outbursts.

App. B, 323 F.3d at 648.

The Eighth Circuit Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291. CJN and his mother seek issuance of a Writ of Certiorari to the Eighth Circuit Court of Appeals so that the decision can be reviewed and reversed.

REASONS FOR GRANTING THE PETITION

The Eighth Circuit's published ruling conflicts with the plain language of the IDEA, this Court's decision in *Board of Education of the Hendrick Hudson Central School District v. Rowley,* 458 U.S. 176, 102 S.Ct. 3034 (1982), published decisions in the First, Third, Fourth, Sixth and Ninth Circuits, and other published decisions of the Eighth Circuit.

The Eighth Circuit's published opinion limits the meaning of "educational benefit" under the Act to academic benefit alone in a manner that undermines the individualized requirements for special education.

The issuance of a Writ in this matter is important to the utilization of the public schools by a large number and variety of disabled students. The vitality of state educational standards is at stake, as is the authority of the several states to set and enforce educational standards. The

decision below conflicts with the well-established and consistent construction given state educational standards by the administrative agency charged with its enforcement. The intent and meaning of the IDEA will be left in a state of confusion without this Court's clarification and restoration of the federal statutory principles eroded by the decision below. The issues presented are significant in administration of the IDEA by administrative hearing officers and lower courts. The decision below will cause a serious hindrance to the effective administration of the law.

I. The Eighth Circuit Has Decided An Important and Recurring Issue of Federal Special Education Law In A Manner That Conflicts Directly With This Court's Decision In *Rowley.*

CJN was provided a standardized program of special education and the appropriateness of that program was judged by a single standardized measure unrelated to his IEP. The conclusion of the majority below that this is all that is required under the IDEA is directly contrary to this Court's decision in *Board of Education of the Hendrick Hudson Central School District v. Rowley,* 458 U.S. 176, 102 S.Ct. 3034 (1982). This Court recognized:

> The 'free appropriate public education' required by the Act is tailored to the unique needs of the handicapped child by means of an 'individualized educational program' (IEP).

Rowley, supra at 181. This Court recognized the Act's

requirements for: 1) periodic review and revision of a child's IEP based on an assessment of progress towards achievement of the IEP goals (458 U.S. at 182); a delicate balance – deferring to the states on issues of educational methods and standards (without limitation), yet imposing significant requirements to be followed to discharge the responsibility for educating disabled children (458 U.S. at 183, 206-208); maintaining disabled children in the least restrictive environment (458 U.S. at 202-203); educating a wide spectrum of disabled children with varying abilities and needs, some academic and some non-academic (458 U.S. at 202); and the individualized nature of the assessment of sufficiency of educational benefits obtained (458 U.S. at 202).

> One child may have little difficulty competing successfully in an academic setting with nonhandicapped children while another child may encounter great difficulty in acquiring even the most basic of self-maintenance skills. We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act.

Rowley, supra at 202. This Court also recognized that testing, grading and advancement systems of the *regular classrooms* of public schools are "an important factor in determining educational benefit." *Id.* at 203. These factors do not apply to an analysis of the educational benefit CJN

received because he was educated in a self-contained special education classroom. Finally, this Court recognized that the appropriateness of special education must be measured by the success in "providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Id.* CJN's personalized instruction and support services are contained in his IEP goals and behavior intervention plan that focused exclusively on his attainment of social, emotional and behavioral goals. CJN's progress in achieving those goals is the only reasonable measure of the success or failure of his special education program.

The IDEA's requirements for individualized assessments of eligibility and needs, individually tailored programs of special education, periodic review and revision of achievement of goals on IEPs, positive behavioral support, manifestation determinations, limitations on disciplinary exclusions, least restrictive environment, and incorporation of state educational standards were essentially ignored by the court below, in direct contradiction to the explicit requirements of the Act and the decision in *Rowley*.

If all that is required to demonstrate an appropriate program of education to any disabled student is a showing of minimal progress on a standardized academic achievement test, then many of the IDEA's requirements are rendered meaningless. It will not matter that the IDEA

requires individualized assessment of each child's eligibility and needs. 20 U.S.C. § 1414(a), (b), and (c). It will not matter that the IDEA requires individually tailored programs of special education and related services to address assessed needs. 20 U.S.C. § 1414(d)(1)(A) and (d)(3)(A). It will not matter that the IDEA requires consideration of strategies and supports to address behavior that impedes the learning of the child or others, including positive behavioral interventions. 20 U.S.C. § 1414(d)(3)(B). It will not matter that the IDEA requires periodic review of a child's IEP to determine whether the goals are being achieved, and that the IEP be revised if progress towards goals is less than expected. 20 U.S.C. § 1414(d)(4). It will not matter that the IDEA requires the provision of a free appropriate public education to disabled children that both meets the standards of the State educational agency and is provided in conformity with an appropriately individualized education program. 20 U.S.C. §§ 1402(8)(B) and (D); 1412(a)(1). It will not matter that a state has exercised its authority to set state educational standards requiring the use of positive behavior interventions and limiting the overuse of aversive and deprivation procedures. Minn. Stat. § 121A.67, Minn. R. 3525.0850, and Minn. R. 3525.2900, Subp. 5. It will not matter that the IDEA limits the disciplinary exclusions of students with disabilities, and requires functional behavioral assessment and behavioral intervention plans to

address the behavior. 20 U.S.C. § 1415(k)(1). It will not matter that the IDEA requires school districts to analyze the relationship between a disabled child's disability and behavior leading to discipline, in order to customize an appropriate response. 20 U.S.C. § 1415(k)(4) and (5). It will not matter that the IDEA requires disabled children to be educated in the least restrictive environment, 20 U.S.C. § 1412(a)(5), a requirement only made meaningful if effective supports and services eliminate disciplinary removals from the classroom and school.

A. The Standard Established By This Court in *Rowley* Is Outdated And Was Significantly Altered by Intervening Acts of Congress.

This Court decided *Rowley* in 1982, at a time when it was operating under a misunderstanding of the interplay between the IDEA and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Section 504"). Section 504 requires equality of opportunity, participation and benefits for disabled children in all federally funded programs, including special education.

> No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . .

29 U.S.C. § 794(a).

The *Rowley* majority specifically rejected the conclusion of the court of appeals that the IDEA and Section 504 must be read *in pari materia,* such that the appropriateness of a program of special education must be based, at least in part, on the equality of opportunity, benefits and services received by a disabled child in relation to his non-disabled peers. *Id.* at 189-190. The *Rowley* majority also limited its interpretation of the legislative intent in enacting the IDEA to congressional findings regarding opening the schoolhouse doors to disabled children, concluding that appropriate special education was little more than simple access to school. *Id.* at 191-192. This view of the intent of Congress in enactment had the effect of limiting the measure of the rights and protections contained in the Act. *Id.* There have been significant changes on both these fronts since the *Rowley* decision was issued that make its analysis and conclusions outdated and of questionable continuing validity.

The misunderstanding of the interplay between the IDEA (then the Education of the Handicapped Act) and Section 504 was illuminated further in this Court's decision in *Smith v. Robinson,* 468 U.S. 992, 1019-1020, 104 S.Ct. 3457, 3472 (1984) when it concluded that the IDEA and Section 504 were essentially duplicative. This was the same basis on which the *Rowley* Court rejected an equality of opportunity assessment of the adequacy of special

education under the Act. *Rowley, supra* at 189-190.

> Congress read the Supreme Court's decision in *Smith* and acted swiftly, decisively, and with uncharacteristic clarity to correct what it viewed as a judicial misinterpretation of its intent.

Fontenot v. Louisiana Board of Elementary and Secondary Education, 805 F.2d 1222 (5th Cir. 1986), cited with approval in *Cudjoe v. Independent School District No. 12*, 297 F.3d 1058 (10th Cir. 2002); *Wheeler v. Towanda Area School Dist.*, 950 F.2d 128 (3rd Cir. 1991); *Digre v. Roseville Schools Independent District No. 623*, 841 F.2d 245 (8th Cir. 1988); and *Georgia Ass'n of Retarded Citizens v. McDaniel*, 855 F.2d 805 (11th Cir. 1988).

Congress responded by enacting the Handicapped Children's Protection Act of 1986, P.L. 99-372, August 5, 1986, 100 Stat. 796, revising the Act to clearly provide that the rights and protections of the IDEA do not displace, and are not coextensive but are coterminous with, the rights and protections of Section 504. 20 U.S.C. § 1415(l), formerly § 1415(f) provides:

> Nothing in this title shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities . . .

Congress was clear that disabled children are entitled to equal opportunities to participate in and benefit from public

education in addition to the rights and protections afforded them under the Act.

The IDEA as reauthorized by Congress in 1997 updated the findings on which the revised Act was improved. Congressional findings in the IDEA 1997 focused, among other things: on improving educational results for disabled children (20 U.S.C. § 1401(c)(1) and (3)), on increasing expectations for students with disabilities and on applying proven methods of teaching and learning for children with disabilities (20 U.S.C. § 1401(c)(4)), and on making the education of children with disabilities more effective through high expectations, access to general curriculum, parental participation, services and supports in the regular classroom, and professional development for special educators to ensure that children with disabilities have skills and knowledge:

> (i) to meet developmental goals and, to the maximum extent possible, those challenging expectations that have been established for all children; and
>
> (ii) to be prepared to lead productive, independent, adult lives, to the maximum extent possible.

20 U.S.C. § 1401(c)(5). Congress was clear that simply providing access and minimal academic benefit is no longer sufficient under the Act.

The words of this Court in *Brown v. Bd. Of*

Education of Topeka, 347 U.S. 483, 74 S.Ct. 686 (1954) apply today to disabled children of this nation.

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Brown, supra at 493.

B. Minnesota Has Set Educational Standards For Behavior Interventions.

The Act, at 20 U.S.C. § 1402(8), requires that special education services meet the State's educational standards, as recognized by this Court in *Rowley,* 458 U.S. at 187-189, 203. This is one of the conditions that must be met in order for a school district to provide a disabled

student a free appropriate public education. *Id.* at 188-189. If state standards are not met, then a free appropriate public education is not being provided, as was the case with CJN. Minnesota has longstanding educational standards governing behavioral interventions for special education students. Minnesota law governs the use of aversive and deprivation procedures, and directs that special education rules in Minnesota must "promote the use of positive approaches and must not encourage or require the use of aversive or deprivation procedures." Minn. Stat. § 121A.67. State educational policy and standards in Minnesota provide:

> This policy is intended to encourage the use of positive approaches to behavioral interventions. The objective of any behavioral intervention must be that pupils acquire appropriate behaviors and skills. It is critical that behavioral intervention programs focus on skills acquisition rather than merely behavior reduction or elimination. Behavioral intervention policies, programs, or procedures must be designed to enable a pupil to benefit from an appropriate, individualized educational program as well as develop skills to enable them to function as independently as possible in their communities.

Minn. R. 3525.0850. Minnesota standards require that behavior interventions to disabled students both permit benefit from an appropriate IEP, as well as promote

development of independent functioning skills. For CJN, neither of these outcomes is measured by minimal academic progress on a standardized achievement test.

Minnesota educational standards also limit the use of aversive and deprivation procedures in that they cannot be utilized unless: 1) they are written in the child's IEP or are used in an emergency; 2) a functional behavioral assessment identifies the frequency and severity of target behaviors; 3) at least two positive interventions are implemented and their effectiveness identified; and 4) they are designed and implemented based on a child's assessed needs, consistent with his goals and documented in his IEP. Minn. R. 3525.2900, Subp. 5. In addition, Minnesota parents may withhold or withdraw consent to the use of these procedures, and they must be stopped immediately. Minn. R. 3525.2900, Subp. 5(E). In 2001, the Minnesota legislature amended the child abuse statute to include within its definition of "physical abuse" the unauthorized use of aversive and deprivation procedures in schools. Minn. Stat. § 626.556, subd. 2(d).

The Minnesota Department of Education (formerly the Minnesota Department of Children, Families & Learning)("MDE") is the state agency charged with supervising special education services in all school districts in Minnesota, and with investigating, deciding and correcting violations of special education students' rights. 20 U.S.C. § 1412(a)(11); 34 C.F.R. § 300.660-.662. MDE

has repeatedly and consistently interpreted and enforced Minnesota state educational standards regarding behavior interventions with disabled students in a manner virtually ignored by the majority opinion below. Four examples of relevant state complaint decisions are reproduced in the Appendix at V-Y, demonstrating the widespread problems with overuse and abuse of conditional procedures in Minnesota despite high state educational standards.

> The use of time-out for seclusion, manual and mechanical restraints, and other interventions are extraordinary measures to be used as little as possible and for short durations. The frequent and prolonged use of the intervention area, including [seclusion], with the Student should have prompted the District to conduct an evaluation early in his placement . . .

Complaint Decision No. 1408 (SEA MN March 29, 2002). App., Y.

> Seclusion for brief periods may be defensible, but not confinement for one to six hours forcing a student into discomfort, making this a punitive, negative intervention.

Id., citing Minn. R. 3525.2900, subp. 5(D)(6) and 3525.0850. MDE recognized that where the public schools use conditional procedures without adherence to Minnesota educational standards governing their use, a disabled student is unnecessarily removed from his classroom, deprived of educational opportunities, impairing his ability

to receive a free appropriate public education, and entitling him to remedial relief. App. Y.

MDE next determined that the school violated state standards by the frequent use of restraints and isolation "without due consideration of alternatives. In addition, isolated seclusion for hours at a time is grievous." *Complaint Decision No. 1730*, (SEA MN Sept. 19, 2002). App. X. The MDE determined again that when behavior interventions fail to meet state standards students suffer educational harm due in part to loss of instructional time during disciplinary removals from the classroom. App. X.

MDE determined again that the school violated state standards by the frequent use of breakout rooms without complying with Minnesota educational standards. *Complaint Decision No. 1760* (SEA MN December 19, 2002). App. W. MDE was troubled by the pervasive and frequent use of time-outs, noting that "seclusion of a Student in public schools is highly regulated because of its potential detrimental effect on the Student." App. W, citing to CFL Policy Letter, May 15, 2002. MDE determined that conditional procedures not done on an individualized basis according to the individual needs of students do not justify this type of "extraordinary form of intervention" and cannot be used except in emergency situations. App. W. MDE concluded that when conditional procedures resulted in removals from class, students were also deprived of educational services. App. W.

> The use of breakout rooms for hours at a time and for large cumulative totals is grievous. Moreover, if Students have been removed from instructional opportunities for discipline whether in the form of suspensions, in-school suspensions or breakout rooms, for over ten cumulative days, there may be a change in placement.

Id., App. W.

Again, MDE concluded that the use of aversive and deprivation procedures without following the proper conditions for use in Minnesota educational standards violates a student's right to a free appropriate public education under the Act, entitling him to remedial relief. *Complaint Decision No. 1809* (SEA MN February 18, 2003). App. V.

> Whether a specially designed room is locked is not the determinative factor in determining whether a procedure constitutes time-out for seclusion. The key consideration is whether the Student was isolated from others.

Id., App. V. MDE concluded that without criteria for returning the student to the classroom, without limits on the time that students may be secluded, without an evaluation to determine whether seclusion is contraindicated for psychological or physical health reasons prior to its use, without parental consent, and without inclusion in the student's IEP, seclusion time-outs violated state

educational standards. *Id.*, App. V.

Analyzed under the appropriate state educational standards as demonstrated through these MDE complaint decisions, the District's use of aversive and deprivation procedures without compliance with the conditions for use constituted repeated and serious violations of CJN's rights and resulted in denial of a free appropriate public education.

II. The Eighth Circuit Has Decided The Standard for Federal Special Education Benefit In a Manner That Conflicts Directly Or In Principle With Rulings Of the First, Third, Fourth, Sixth and Ninth Circuits.

The majority decision below determined that a standardized program of special education to address CJN's emotional and behavioral disability was sufficient to provide a free appropriate public education to him under the IDEA, as measured by his academic progress on a standardized academic achievement test. App. B. The majority decision also concluded that punitive and counter-productive behavior interventions that violate state educational standards provided a free appropriate public education to CJN under the Act. App. B. These decisions conflicts directly or in principle with multiple rulings of other circuit courts.

The First Circuit Court of Appeals determined that behavioral skills as well as academic skills must be taught

if a child's assessment indicates his need for such instruction, in order to receive a free appropriate public education under the IDEA. *David D. v. Dartmouth School Committee,* 775 F.2d 411, 423 (1st Cir. 1985). The Court recognized that the child's lack of self-control and related behavior problems were educational problems that must be addressed in order for his participation at school and in his community. *Id.*, 775 F.2d at 423. The Court also decided that the IDEA requires adherence to state educational standards in evaluating the appropriateness of special education services. *Id.*, 775 F.2d at 417-419.

The Third Circuit Court of Appeals decided that a child's assessed needs for non-academic services (physical therapy) were individualized educational services to be provided under the Act, and that trivial or de minimis education benefits do not satisfy the Act's guarantee of a free appropriate public education. *Polk v. Central Susquehanna Intermediate Unit 16,* 853 F.2d 171 (3rd Cir. 1988). The Court recognized that many related services provided pursuant to the Act "serve as important facilitators of classroom learning." *Id.* at 176. "Where basic self-help and social skills such as toilet training, dressing, feeding and communication are lacking, formal education begins at that point." *Id.* The Court recognized that instruction in these fundamental skills "may form the core of a severely disabled child's special education program." *Id.*

> Christopher's progress cannot be measured by advancement in grade or acquisition of academic skill. His needs are drastically different, but no less important.

Id. See also, Kruelle v. New Castle County School District, 642 F.2d 687, 693 (3rd Cir. 1981)(special education for a low-functioning child stresses basic life skills); *Board of Education v. Diamond,* 808 F.2d 987, 992 (3rd Cir. 1986)(some benefit connotes an amount of benefit greater than mere trivial advancement); *M.C. v. Central Regional School District,* 81 F.3d 389 (3rd Cir. 1996)(IDEA requires more than a *de minimis* benefit, and educational progress is measured according to child's identified needs to address behaviors and functional skills); and *Ridgewood Board of Education v. N.E.,* 172 F.3d 238 (3rd Cir. 1999)(a free appropriate education is more than a trivial benefit, but must provide significant learning and confer meaningful benefit, and when student display considerable intellectual potential, IDEA requires a great deal more than a negligible benefit).

In *Clevenger v. Oak Ridge*, 744 F.2nd 514 (6th Cir. 1984), the court found that because "Richard's main learning problem" was "his inability to cooperate with authority," the district was obligated to provide a program that "specifically takes into account and provides for this lack of cooperation." The Sixth Circuit rejected the district's argument that its obligation is mitigated by an

expectation that the student demonstrate motivation and cooperation and specifically ordered the district to provide programming that met the student's unique educational needs. *Id.* at 516. See also, *Kaelin v. Grubbs*, 682 F.2d 595 (6th Cir. 1982).

The Fourth Circuit decided, in *Hall v. Vance County Bd. of Educ.*, 774 F.2d 629 (4th Cir. 1985), that the *Rowley* analysis was limited to that one case when it adopted promotion and grades as a means of determining the student's progress. *Id.* at 635-636. The *Hall* Court agreed that special education must be tailored to the individual child's capabilities. *Id.* at 636.

More recently, the Ninth Circuit in *Seattle School Dist. No. 1 v. B.S.*, 82 F.3d 1493 (9th Cir. 1996) put a much finer point on the issue when it found that testing appropriately on standardized tests is not the *sine qua non* of educational benefit and that unique educational needs "shall be broadly construed to include the handicapped child's academic, social, health, emotional, communicative, physical and vocational needs." *Id.* at 1500.

III. The Eighth Circuit's Decision Is In Conflict With Its Other Rulings.

The Honorable Kermit E. Bye, in his dissent, articulates the conflict created by the majority decision with previous decisions of the Eighth Circuit Court. App. B. In *Ind. Sch. Dist. No. 284 v. A.C.*, 258 F.3d 769, 776-777 (8th

Cir. 2001) the court established that behavior problems must be effectively addressed for students whose special education needs are based on disabilities that impair their behavioral skills. The court in *A.C.* held the school district responsible to teach the student emotional, behavioral and social skills as part of its duty to provide special education on the basis of her social, emotional and behavioral disability, even when that duty required an extraordinary, residential, full-time, individualized treatment program. *A.C., supra* at 779.

The court in *Neosho R-V School Dist. v. Clark,* 315 F.3d 1022, 1028 (8th Cir. 2003) decided that the lack of an effective behavior intervention plan deprives a disabled student of his right to a free appropriate public education, and unsupported claims of academic progress for a child whose IEP identifies a need for behavioral *and* academic instruction does not alter that conclusion. CJN did not have an effective behavior intervention plan as demonstrated by the undisputed evidence on the record of his regression on the behavioral goals on his IEP that identified a need for *only* behavioral instruction. The *Clark* Court analyzed the adequacy of Robert's IEP based on the ability of his teachers to "successfully reduce the inappropriate behavior in a manner fitting to Robert's disabilities." *Id.* at 1029. The court in *Clark* recognized that specific evidence of *de minimis* academic and social progress can be discounted in light of contradictory evidence in a record, and evidence of

progress on skills addressed by the main goal of a student's IEP is the proper focus of analysis of educational benefit under the Act. *Id.* at 1029.

The court in *Gill v. Columbia 93 Sch. Dist.*, 217 F.3d 1027, 1034 (8th Cir. 2000) correctly recognized that the IDEA requires a specialized course of instruction to be developed for each disabled student, taking into account the child's capabilities. A standard program is not a specialized course of instruction taking into account his particular disabilities, and no evidence in the record supports C.J.N.'s progress with behaviors. The *Gill* Court correctly analyzed the educational benefit of Matthew's IEP in the context of his disability and based on the content of his IEP addressing his cognitive, verbal and social skills deficits. *Id.* at 1038. The majority here analyzed the educational benefit of CJN's IEP on the basis of standardized academic testing when his IEP recognized his strength in standardized academic testing.

The court in *Ft. Zumwalt Sch. Dist. v. Clynes*, 119 F.3d 607, 612-613 (8th Cir. 1997) recognized that the nature of the student's disability and the progress he makes on the goals identified in his IEP must be considered in determining the benefit of a special education program. The majority decision did not address the lack of progress CJN made on the goals identified in his IEP. By focusing on the benefit derived by CJN in his area of non-disability, the majority undercuts the very purpose of the Act.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,
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